

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Wisconsin Resources Protection
Council, Center for Biological
Diversity, and Laura Gauger,

Plaintiffs,

Case No. 11-cv-45

v.

Flambeau Mining Company,

Defendant.

NOTICE OF WITHDRAWAL
OF PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OTHER THAN
A FEDERAL REGISTER NOTICE OR LETTER TO THE WISCONSIN GOVERNOR
THAT WIS. ADMIN. CODE § NR 216.21(4) OR WIS. STAT. § 283.33 IS PART OF
THE APPROVED WISCONSIN CLEAN WATER ACT PERMIT PROGRAM

Plaintiffs, through undersigned counsel, hereby provide notice of withdrawal of their motion in limine to exclude any evidence offered in this case related to whether Wis. Admin. Code § NR 216.21(4)(a) or Wis. Stat. § 283.33 is part of the approved Wisconsin Clean Water Act permit program (dkt. # 122) because the subject of the motion has already been decided by the Court as a matter of law in the Court's Opinion and Order on summary judgment (dkt. # 137) and the motion is no longer necessary.

Plaintiffs' motion seeks to limit the evidence that could be admitted in support of Defendant's affirmative defense that it has met the Clean Water Act's requirements and has a "permit shield" because it holds a state mining permit. In particular, Plaintiff moved to bar evidence to show that the state mining permit program has been

approved by the EPA as part of the state's 33 U.S.C. § 1342 (Clean Water Act § 402) permit program other than two possible documents required for such approval under the EPA regulations: a Federal Register notice of an approval or an authenticated letter from the EPA to the Wisconsin Governor (or his designee) confirming the approval. (See Dkt. # 56 p. 56 ("to qualify as part of Wisconsin's § 402 permit program and satisfy the permit shield exception in § 402, § NR 216.24 must have been submitted to the EPA and the EPA must have approved that regulation under 40 C.F.R. § 123.62(b) through either a Federal Register notice or a letter to the governor or a designee.") Because the Court has found that "Defendant's mining permit is not a permit under § 402 of the Clean Water Act" (dkt. # 137 p. 67) and, thus, denied its permit shield defense (*id.* p. 62), the evidence would be irrelevant to the remaining issue of liability and the motion is no longer necessary.

At trial, Defendant may raise its alleged good faith belief that, although in error, it thought it held a Clean Water Act permit for purposes of assessing civil penalties. To the extent Defendant claims other sources of evidence of EPA-approval in support of lowering the penalty, Plaintiffs will make their objections and arguments at trial.

WHEREFORE, Plaintiffs hereby provide notice of withdrawal of their motion in limine to exclude any evidence offered in this case related to whether Wis. Admin. Code § NR 216.21(4)(a) or Wis. Stat. § 283.33 is part of the approved Wisconsin Clean Water Act permit program (dkt. # 122).

Respectfully submitted this 2nd day of May, 2012.

McGILLIVRAY WESTERBERG & BENDER LLC

/s/Pamela R. McGillivray

James N. Saul

Christa O. Westerberg

David C. Bender

Pamela R. McGillivray

McGillivray Westerberg & Bender LLC

211 S. Paterson Street, Suite 302

Madison, WI 53703

608.310.3560 (Ph)

saul@mwbattorneys.com

westerberg@mwbattorneys.com

bender@mwbattorneys.com

mcgillivray@mwbattorneys.com

Marc D. Fink

CENTER FOR BIOLOGICAL DIVERSITY

209 East 7th St.

Duluth, MN 55805

(218) 525-3884

mfink@biologicaldiversity.org

Daniel Mensher

PACIFIC ENVIRONMENTAL ADVOCACY CENTER

Lewis & Clark Law School

10015 SW Terwilliger Blvd.

Portland, OR 97219

(503) 768-6926

dmensher@lclark.edu

*Counsel for Plaintiffs Wisconsin Resources
Protection Council, Center for Biological Diversity,
and Laura Gauger.*